In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1505

THE BEHRENS DRUG COMPANY, PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20)[1] is reported at 475 F. 2d 1041. The findings of fact and conclusions of law of the district court (A. 204-226) are not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21) was entered on February 12, 1973. The petition for a writ of certiorari was filed on May 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]"Pet. App." references are to the separate appendix which accompanied the petition for a writ of certiorari. "A." references are to the appendix in the court of appeals, which has been lodged with the Clerk.

QUESTION PRESENTED

Whether the courts below correctly found that petitioner's training program, in which no woman had ever participated and which had no definite termination point, was not a bona fide "factor other than sex" within the exception provided in Section 6(d)(1)(iv) of the Fair Labor Standards Act's equal pay provisions and thus did not justify petitioner's practice of paying men more than women for the same work.

STATUTE INVOLVED

The equal pay provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060 *et seq.*, as amended, 29 U.S.C. 201 *et seq.*, and the pertinent provisions of the Secretary's interpretative bulletin, 29 C.F.R. 800, are set forth in the petition for a writ of certiorari (pp. 3-4).

STATEMENT

The Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act (29 U.S.C. 217)[2] to enjoin petitioner from continuing to violate the Act's equal pay provisions by paying male order fillers, city order desk clerks, and checkers and the male supervisor of its IBM data processing department wages at rates higher than those paid to women holding the same positions and performing the same duties as the men. The Secretary also sought to restrain the withholding of back wages due to the women employees as a result of the violations.

Petitioner—a drug wholesaler with annual sales in excess of $1,000,000 (Pet. App. 12, n. 8)—claimed that the

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[2]The petition erroneously states that the action was filed under Section 16(c) of the Act (Pet. 5).

work of the men and women checkers and of the male supervisor of the IBM data processing department and his female successor was unequal and thus justified a disparity in wages. Petitioner also claimed that its payment of disparate wages to the male and female order fillers and city order desk clerks was justified because the men, but not the women, were in a training program to become outside salesmen. Petitioner claimed that this program was bona fide under 29 C.F.R. 800.148 and thus within the "factor other than sex" exception in Section 6(d)(1)(iv) of the Act's equal pay provisions. The district court found that all the employees in question did perform equal work and rejected the "factor other than sex" defense. Accordingly, it granted the relief sought by the Secretary. Its decision was upheld in all respects by the court of appeals.

The petition for a writ of certiorari seeks review only of that part of the decision below concerning petitioner's "factor other than sex" defense. The district court rejected the "training program" as a basis for wage differentials, finding that petitioner "did not have any written or formal plan of training"; that the "so-called trainees received no formal course of instruction," but "worked along side-by-side with the female employees" who received lower pay; that the length of time spent in the training course was "dependent entirely upon whether and when the company needed or desired to employ [the male employee as] an additional outside salesman"; that "[m]any of the young men worked only a few months and became discouraged and quit"; and that others "worked many months, some for years, and were never promoted to the position of outside salesman" (A. 219); and, finally, that petitioner had never included women in its attempts to

recruit sales trainees or offered an outside selling job to a woman and had no intention of doing so (A. 220).[3]

The court of appeals agreed, pointing out that petitioner's training program "suffers from two principal weaknesses" (Pet. App. 8): (1) its "termination point is subject to the vagaries of the business climate and the company's personnel needs" (*ibid.*); and (2) it is "male dominated" (Pet. App. 9). In holding that petitioner's training program was not a bona fide training program which constituted a "factor other than sex" justifying a pay differential, the court also cited the testimony of petitioner's president "that women are not solicited as sales trainees because 'females were never considered as suitable for traveling'" as "a clear example of the attitude of male suitability designed to be nullified by the Equal Pay Act" (Pet. App. 10).

ARGUMENT

In its holding that a male-dominated training program of indefinite duration does not qualify for the

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[3]Petitioner's statement that it had offered a trainee position to a woman (Pet. 23-24) is contrary to the trial court's findings on the point (A. 220) and to the testimony of petitioner's president that women have never been included in the training program (A. 528, 554-555) because they "were never considered as suitable for traveling" (A. 546). In now stating otherwise, petitioner relies on the fact that it asked one woman, not in the training program, to fill in temporarily for an outside salesman while he underwent surgery (A. 441). The woman declined the offer because it involved a temporary assignment (A. 448-449) with no increase in pay (A. 444-445). The petition also states that "[p]articipants in the program are required to conform to a uniform educational background (A. 815)" (Pet. 9). That "uniform educational background" consists of a high school education (A. 815) an attainment which all of the female employee witnesses possessed (A. 269-270, 450).

"factor other than sex" exception provided in Section 6(d)(1)(iv) of the Act, the decision below is in accord with the other court of appeals' decisions which have considered the issue. See *Hodgson* v. *Fairmont Supply Co.*, 454 F. 2d 490 (C.A. 4); *Hodgson* v. *Security National Bank of Sioux City*, 460 F. 2d 57 (C.A. 8); *Shultz* v. *First Victoria National Bank*, 420 F. 2d 648 (C.A. 5). In all of these cases, the courts examined the training programs offered in justification of the higher male rates and, upon finding that they rested on "unfair" and "outmoded" conceptions regarding the value of women's work (*Security National Bank, supra*, 460 F. 2d at 63), held that "We cannot accept a training program co-terminous with a stereotyped province called 'man's work' as a factor other than sex" (*Fairmont Supply, supra*, 454 F. 2d at 498). Thus, such training programs, which consist "of little more than recognition of the ability of employees to work their way up the ranks" (*First Victoria, supra*, 420 F. 2d at 654; *Security National Bank, supra*, 460 F. 2d at 62; and *Fairmont Supply, supra*, 454 F. 2d at 498), are not within the statutory exception because they are based on sex, rather than on a bona fide "factor other than sex."

Here, the court of appeals carefully examined petitioner's training program and found that, although it was neither "illusory" nor "a mere post-event justification for disparate wage payments," the fact remained that women were not included in it "because 'females were never considered as suitable for traveling'" (Pet.

App. 10).[4] This, coupled with the fact that advancement to a sales job depended entirely upon personnel needs, "compel[s] the conclusion that Behrens' training procedure is not a factor other than sex which should excuse denial of equal pay to female workers and remove them from the aegis of the Equal Pay Act" (*ibid.*). This holding, like the other court of appeals decisions (*supra*) involving similarly unstructured and male-oriented training programs, correctly applies the long standing principle that exemptions from the Fair Labor Standards Act "must therefore be narrowly construed" and applied only to those "plainly and unmistakably within [their] terms and spirit" (*Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493; *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392).[5]

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[4]Petitioner's attempt to justify the exclusion of women from its training program on the basis of state laws and traveling conditions as they existed in 1946 (Pet. 12, fn.) merely confirms the fact that it had its origin in sex. Moreover, the Equal Pay Act was not enacted until 1963, and petitioner had a period of one year thereafter within which to bring about compliance, either by opening up its training program to women or by raising their rates of pay to those of the male "trainees." It did neither.

[5]Petitioner's argument that neither the decided cases nor 29 C.F.R. 800.148 provide "much help" as to what constitutes a "bona fide training program" and that it should not be "penalized" now for its good faith effort to "formulate" a training program under the Secretary's "nebulous guidelines" (Pet. 15), is answered by the fact that petitioner's training program was formulated in 1946 and not revised with the advent of the Equal Pay Act in 1963 (see n. 4, *supra*). Moreover, the decisions cited above give considerable illumination to the requirement of the Act. In any event, as the Court stated in *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 583 (footnote omitted), any such "difficulty does not warrant shifting the burden to the [women] employee[s]. [Equal] wages were specified for [them] by the statute, and [they were] no more at fault than the employer."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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